IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

SUPREME COURT, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 71-6698

MARION P. MORRIS, On Behalf of
LINDA GAIL MORRIS,

Petitioner,

v.

ELLIOT L. RICHARDSON, Secretary of
Health, Education and Welfare,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 52) is reported at 455 F.2d 775. The opinion of the District Court (App. 46) is reported at 335 F. Supp. 1178.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 1972. (App. 52). A timely petition for rehearing was denied on February 22, 1972. (App. 58). The petition for a writ of certiorari was filed on May 22, 1972 and was granted October 10, 1972. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in part, that "no person shall . . . be deprived of life, liberty, or property, without due process of law."

The Tenth Amendment to the Constitution of the United States provides that "The powers not delegated to The United States by The Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The statute at issue is the Social Security Act, as amended. As of the date of the decisions below, Section 202(d)(1) of the Act, 42 U.S.C. §402(d)(1), read, in pertinent part, as follows:

> (d)(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child--
>
> (A) has filed application for child's insurance benefits,
>
> * * * * *
>
> (C) was dependent upon such individual--
>
> * * * * *

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits and ending with the month preceding whichever of the following first occurs–

(D) the month in which such child dies, marries, or is adopted (except for adoption by a stepparent, grandparent, aunt, uncle, brother, or sister subsequent to the death of such fully or currently insured individual),

* * * * *[1]

---

[1] Section 202(d)(1)(D) was amended by Section 112 of The Social Security Amendments of 1972, 86 Stat. 1347 (October 30, 1972). Section 112 reads as follows:

Sec. 112. (a) Paragraph (1)(D) of section 202(d) of the Social Security Act is amended by striking out "marries" and all that follows and inserting in lieu thereof "or marries,":

(b) The amendment made by subsection (a) shall apply only with respect to monthly benefits under title II of the Social Security Act for months beginning with the month in which this Act is enacted.

(c) Any child–

(1) whose entitlement to child's insurance benefits under section 202(d) of the Social Security Act was terminated by reason of his adoption, prior to the date of the enactment of this Act, and

(2) who, except for such adoption, would be entitled to child's insurance benefits under such section for a month after the month in which this Act is enacted,

may, upon filing application for child's insurance benefits under the Social Security Act after the date of enactment of this Act, become reentitled to such benefits; except that no child shall, by reason of the enactment of this section, become reentitled to such benefits for any month prior to the month after the month in which this Act is enacted.

Section 202(d)(3) of the Act reads, in pertinent part, as follows:

> (3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—
>
> (A) Such child is neither the legitimate nor adopted child of such individual, or
>
> (B) Such child has been adopted by some other individual***.

Section 202(d)(8) of the Act provided, as of the dates of the application for benefits and decisions below, in this case:

> (8) In the case of—
>
> (A) an individual entitled to disability insurance benefits, or
>
> (B) an individual entitled to old-age insurance benefits who was entitled to disability insurance benefits for the month preceding the first month for which he was entitled to old-age insurance benefits, a child of such individual adopted after such individual became entitled to such disability insurance benefits shall be deemed not to meet the requirements of clause (i) or (iii) of paragraph (1)(C) of this subsection unless such child—
>
> (C) is the natural child or stepchild of such individual (including such a child who was legally adopted by such individual), or
>
> (D) was legally adopted by such individual before the end of the 24-month period beginning with the month after the month in which such individual most recently became entitled to disability insurance benefits, but only if—

(i) proceedings for such adoption of the child had been instituted by such individual in or before the month in which began the period of disability of such individual which still exists at the time of such adoption (or, if such child was adopted by such individual after such individual attained age 65, the period of disability of such individual which existed in the month preceding the month in which he attained age 65), or

(ii) such adopted child was living with such individual in such month; or

(E) was legally adopted by such individual—

(i) in an adoption which took place under the supervision of a public or private child-placement agency,

(ii) in an adoption decreed by a court of competent jurisdiction within the United States,

(iii) on a date immediately preceding which such individual had continuously resided for not less than one year within the United States;

(iv) at a time prior to the attainment of age 18 by such child.[2]

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[2]Subsequent to the grant of certiorari in this case, Congress enacted, and the President signed into law, The Social Security Amendments of 1972. Act of October 30, 1972, Pub. L. No. 92-603, 86 Stat. 1346. Section 111 of The 1972 Amendments, which changed Section 202(d)(8), reads as follows:

Sec. 111. (a) Section 202(d) of the Social Security Act is amended by striking out paragraphs (8) and (9) and inserting in lieu thereof the following new paragraph:

"(8) In the case of—

"(A) an individual entitled to old-age insurance benefits (other than an individual referred to in subparagraph (B)), or

"(B) an individual entitled to disability insurance benefits, or an individual entitled to old-age insurance benefits who was entitled to disability insurance benefits for the month preceding the first month for which he was entitled to old-age insurance benefits,

Section 216(e) of the Act reads, in pertinent part, as follows:

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a child of such individual adopted after such individual became entitled to such old-age disability insurance benefits shall be deemed not to meet the requirements of clause (i) or (iii) of paragraph (1)(C) unless such child–

"(C) is the natural child or stepchild of such individual (including such a child who was legally adopted by such individual), or

"(D) (i) was legally adopted by such individual in an adoption decreed by a court of competent jurisdiction within the United States,

"(ii) was living with such individual in the United States and receiving at least one-half of his support from such individual (I) if he is an individual referred to in subparagraph (A), for the year immediately before the month in which such individual became entitled to old-age insurance benefits or, if such individual had a period of disability which continued until he had become entitled to old-age insurance benefits, the month in which such period of disability began, or (II) if he is an individual referred to in subparagraph (B), for the year immediately before the month in which began the period of disability of such individual which still exists at the time of adoption (or, if such child was adopted by such individual after such individual attained age 65, the period of disability of such individual which existed in the month preceding the month in which he attained age 65), or the month in which such individual became entitled to disability insurance benefits, and

"(iii) had not attained the age of 18 before he began living with such individual.

In the case of a child who was born in the one-year period during which such child must have been living with and receiving at least one-half of his support from such individual, such child shall be deemed to meet such requirements for such period if, as of the close of such period, such child has lived with such individual in the United States and received at least one-half of his support from such individual for substantially all of the period which begins on the date of birth of such child."

(e) The term "child" means (1) The child or legally adopted child of an individual, and (2) a stepchild ***.

Section 404.323(c) of Social Security Administration Regulation No. 4, 20 C.F.R. 404.323(c), reads, in pertinent part, as follows:

(c) *Adoption under the supervision of a public or private child-placement agency.* (1) *Public child-placement agency.* For the purposes *** of this section, the term "public child-placement agency" means any governmental agency authorized by a State *** or local governmental agency or component of either to place children in a private home for adoption. The term does not include a court; it also does not include a court investigator, juvenile officer, or other governmental official or agency appointed solely for the purpose of conducting an investigation for the Court in an adoption proceeding unless such governmental official or agency has the authority to place children in private homes for adoption.

(2) *Private child-placement agency.* For the purposes *** of this section, the term "private child-placement agency" means any individual, corporation, organization, or institution licensed or approved by a State or local governmental agency or

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(b) The amendment made by subsection (a) shall apply with respect to monthly benefits payable under title II of the Social Security Act for months after December 1967 on the basis of an application filed in or after the month in which this Act is enacted; except that such amendments shall not apply with respect to benefits for any month before the month in which this Act is enacted unless such application is filed before the close of the sixth month after the month in which this Act is enacted.

component of either to place children in a private home for adoption. * * *

(3) *Supervision by a child-placement agency.* For purposes of * * * this section, the term "supervision of a public or private child-placement agency" means that such agency as defined in subparagraphs (1) and (2) of this paragraph, prior to the final decree of adoption, was significantly involved in the adoption by making an investigation to determine the suitability of the adopting parent and the eligibility of the child for adoption, or by issuing a report of such suitability and eligibility, or by making recommendations based on such suitability and eligibility, to the court having jurisdiction of the adoption proceedings. This requirement is not met if such investigation, report, or recommendation by such an agency was not made, whether because it was waived, or because it is not required under applicable State law, or for any other reason.

At the time of the adoption at issue in this case, Section 48-4-1 of the West Virginia Code (Michie's 1966) read, in pertinent part, as follows:

> It shall be lawful for . . . any husband and wife jointly, to petition the circuit court of the county wherein . . . they may reside, or the judge of such court in vacation, for permission to adopt any minor child . . .[3]

At the time of the adoption at issue in this case, Section 48-4-8 of the West Virginia Code (Michie's 1966), read as follows:

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[3] An amendment to this section merely added after the words "circuit court" the words "or any other court of record having jurisdiction of adoption proceedings." Section 48-4-1, West Virginia Code (1972 Supp.).

In counties where the circuit court does not sit as a juvenile court, concurrent jurisdiction in adoption proceedings is hereby extended to such juvenile courts.[4]

Section 49-5-1 of the West Virginia Code (Michie's 1966), reads as follows:

The circuit court of the county shall have original jurisdiction in proceedings brought by petition under this article. If, however, a court of record in addition to the circuit court has been or is subsequently created in a county, proceedings under this article shall be held in the additional court with right of appeal to the circuit court as follows:

(1) The domestic relations court, or if there is none,

(2) The court of common pleas or intermediate court having chancery jurisdiction, or if there is none,

(3) The criminal court.

Section 48-4-3 of the West Virginia Code (Michie's 1966), *as amended*, reads, in pertinent part, as follows:

Upon the presentation of such petition to the court, or the judge of such court in vacation, the same shall be ordered filed with the clerk of such court, and the court or judge thereof shall appoint a day for the hearing of such petition and the examination under oath of the parties in interest. * * * Between the time of the filing of the petition for adoption and the hearing thereon, the court or judge thereof shall, unless the court or judge otherwise directs, cause a discreet inquiry to be

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[4] This section of the Code was repealed when the change noted in the preceding footnote (p. 8) made it unnecessary.

made to determine whether such child is a proper subject for adoption and whether the home of the petitioner or petitioners is a suitable home for such child. Any such inquiry, if directed, shall be made by any suitable person or agency designated by the court, or judge thereof, and the results thereof shall be submitted to the court or judge thereof at or prior to the hearing upon the petition and shall be filed with the records of the proceeding and become a part thereof. * * * Upon the day so appointed the court or judge thereof shall proceed to a full hearing of the petition and examination of the parties in interest, under oath and of such other witnesses as the court or judge thereof may deem necessary to develop fully the standing of the petitioners and their responsibility, and the status of the child sought to be adopted; and if the court or judge thereof shall be of the opinion from the testimony that the facts stated in the petition are true, and if upon examination the court or judge thereof is satisfied that the petitioner is, or the petitioners are, of good moral character, and of respectable standing in the community, and are able properly to maintain and education the child sought to be adopted, and that the best interests of the child would be promoted by such adoption, then and in such case the court or judge thereof shall make an order reciting at length the facts proved and the name by which the child shall thereafter be known, and declaring and adjudging that from the date of such order, the rights, duties, privileges and relations, theretofore existing between the child and his or her parents, shall be in all respects at an end, and that the rights, duties, privileges and relations between the child and his or her parent or parents by adoption shall thenceforth in all respects be the same, including the rights of inheritance, as if the

child had been born to such adopting parent or parents in lawful wedlock, except only as otherwise provided in this article.[5]

Section 48-4-4 of the West Virginia Code reads, in pertinent part, as follows:

> * * * All records of proceedings in adoption cases and all papers and records relating to such proceedings shall be kept in the office of the clerk of the court in a sealed file, which file shall be kept in a locked or sealed cabinet, vault or other container and shall not be open to inspection or copy by anyone, except upon court order for good cause shown. No person in charge of adoption records shall disclose the names of the adopting parent or parents or adopted child except by court order. The clerk of the court keeping and maintaining the records in adoption cases shall keep and maintain an index of such cases separate and distinct from all other indices kept or maintained by him, and the index of adoption cases shall be kept in a locked or sealed cabinet, vault or other container and shall not be open to inspection or copy by anyone, except upon court order for good cause shown. * * *
>
> * * * [T]he said registrar of vital statistics shall forthwith issue and deliver by mail to the adopting parents at their last known address and to the clerk of the county court of the county wherein such order of adoption was entered a birth certificate in the form required by law, except that the name of

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[5] For simplicity, this Section, and the following two Sections of West Virginia's adoption law are reproduced in their current form. Each has been amended slightly, but not significantly, since 1966, the year of the adoption in this case.

the adoptee shown in said certificate shall be the name given him by the order of adoption. * * *

Section 48-4-5 of the West Virginia Code reads, in pertinent part, as follows:[6]

> Upon the entry of such order of adoption, the natural parent or parents * * * shall be divested of all legal rights, including the right of inheritance from or through the adopted child under the statutes of descent and distribution of this State, and shall be divested of all obligations in respect to the said adopted child, and the said adopted child shall be free from all legal obligations, including obedience and maintenance, in respect to any such parent or parents. From and after the entry of such order of adoption, the adopted child shall be, to all intents and for all purposes, the legitimate issue of the person or persons so adopting him or her and shall be entitled to all the rights and privileges and subject to all the obligations of a natural child of such adopting parent or parents.
>
> For the purpose of descent and distribution, from and after the entry of such order of adoption, a legally adopted child shall inherit from and through the parent or parents of such child by adoption and from or through the lineal or collateral kindred of such adopting parent or parents in the same manner and to the same extent as though said adopted child were a natural child of such adopting parent or parents, but such child shall not inherit from his or her natural parent or parents nor their lineal or collateral kindred, except that a child

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[6]To keep this section from being any bulkier than it already is, certain additional sections of the West Virginia Code, the text of which is not important to the issues of this case, but which are cited in the Argument, have not been reproduced here.

legally adopted by a husband or wife of the natural parent shall inherit from the natural parent of such child as well as from the adopting parent. If a legally adopted child shall die intestate, all property, including real and personal, of such adopted child shall pass, according to the statutes of descent and distribution of this State, to those persons who would have taken had the decedent been the natural child of the adopting parent or parents.

QUESTIONS PRESENTED

1. Whether the provisions of Section 202(d)(8) of the Social Security Act, when applied to deny benefits to certain adopted children of disabled wage earners, conflict with the applicable decisions of this Court regarding the Constitutional guarantee of Due Process of Law.

2. Whether the provisions of the Social Security Act which discriminate between adopted children and natural children with regard to the payment of child's insurance benefits conflict and interfere arbitrarily and unconstitutionally with the State's plenary power in the realm of the adoption of children.

3. Whether the conflict between the provisions of Sections 202(d)(3) and (d)(8) of the Act should be resolved liberally in favor of the granting of benefits to certain adopted children of disabled wage earners.

4. Whether the regulation of the Social Security Administration excluding under all circumstances juvenile courts from the definition of "child-placement agency," as used in Section 202(d)(8) of the Social Security Act, is arbitrarily and unwarrantably restrictive.

STATEMENT OF THE CASE

Petitioner Marion P. Morris is a disabled wage earner who has been receiving Social Security disability insurance benefits since July, 1957. Petitioner and his wife took their granddaughter, Linda Gail Morris, into their home several months after her birth in March, 1965. Linda Gail has lived with petitioner continuously since that time at his home. On October 13, 1966, when Linda Gail was one and a half years old, petitioner and his wife adopted Linda Gail. (App. 27, 28) Nine days later, petitioner filed an application for child's insurance benefits for Linda Gail, which application was denied. (Vol. 2, R. 84).

Following passage of The Social Security Amendments of 1967, petitioner reapplied, on February 28, 1968, for child's benefits for Linda Gail. This application was ultimately denied by the Appeals Council of the Social Security Administration on the ground that the adoption of Linda Gail was not supervised by a child-placement agency as defined by Section 404.323 of Social Security Regulation No. 4, 20 C.F.R. 404.323. (App. 40)

This action was brought in federal district court by Marion P. Morris on behalf of Linda Gail Morris, to review the final decision of respondent Secretary of Health, Education and Welfare, that Linda Gail was not eligible for benefits. The jurisdiction of the district court was invoked pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. 405(g). (App. 47)

No question has been raised throughout the proceedings in this case as to the legal validity of the adoption or the humane motivations of the wage earner and his wife in undertaking to adopt their granddaughter. The issue in this case is the denial of child's insurance benefits solely on account of the *timing* and *manner* of the adoption of Linda Gail.

Linda Gail was placed in the home of wage earner and his wife while still an infant and from that time on was fully dependent upon them. (App. 28, 29) Then, as now, West Virginia law required that a child reside in the home of the adopting parents for at least six months before an adoption could be decreed. Section 48-4-1, West Virginia Code (Michie's 1966). Less than one year after Linda Gail came to live with them, wage earner and his wife petitioned to adopt Linda Gail. (App. 4)

Wage earner and his wife filed their petition to adopt Linda Gail in Raleigh County, the county of their residence, as required by State law. Section 48-4-1, West Virginia Code (Michie's 1966). Raleigh County is a rural county in southern West Virginia. There is no licensed private child-placement agency in the county, nor is there any independent public child-placement agency. (App. 34) In Raleigh County, the Criminal Court has been granted juvenile court jurisdiction. Section 49-5-1(3), West Virginia Code (Michie's 1966). The juvenile court has statutory authority to supervise the placement of children in suitable homes. Section 49-5-14, West Virginia Code (Michie's 1966).

At the time Mr. and Mrs. Morris adopted Linda Gail, the Social Security Act contained no provision permitting a child in Linda Gail's situation to qualify for child's insurance benefits if the adoption was supervised by a child-placement agency.[7] Having no particular reason to turn to the Welfare Department, Mr. and Mrs. Morris applied directly to the Juvenile Court for permission to adopt Linda Gail. The Court appointed the town policeman, a long-time resident of Raleigh County and an

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[7]Subparagraph (E) was added as an alternative to Section 202(d)(8)(D) by the Social Security Amendments of 1967.

officer for more than twenty years, to investigate the Morris home as a potential adoptive home. Following the investigation and a hearing, the Court decreed the adoption. (App. 4)

In his decision of March 18, 1969, the hearing examiner awarded benefits on two alternative grounds: (1) that the child qualified for benefits because she had complied with all necessary requirements of Sections 202(d)(1) and 202(d)(3) of the Act; and (2) that the Juvenile Court of Raleigh County was a child-placement agency within the meaning of Section 202(d)(8)(E) of the Act. (App. 36)[8]

The Appeals Council reversed, holding that Section 404.323 of Social Security Regulation No. 4, 20 C.F.R. 404.323 explicitly precluded the conclusion that a juvenile court was a child-placement agency for purposes of Section 202(d)(8)(E) and that Section 202(d)(9) of the Act[9] precluded a holding that Linda Gail was qualified for benefits under Sections 202(d)(1) and (3) of the Act. (App. 40)

In a Memorandum Opinion denying the Secretary's motion for summary judgment, the District Court for the Southern District of West Virginia held that Section 404.323 of Social Security Regulation No. 4, as applied to the facts of the instant case, in which Linda Gail was the granddaughter of the wage earner, in which the adoption was supervised by the Juvenile Court, in which

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[8]This was a revised decision written after a prior favorable decision by the same hearing officer, and after remand by the Appeals Council for a hearing. (App. 11, 23)

[9]Renumbered Section 202(d)(8) following the Social Security Amendments of 1967.

the adoption occurred in a rural county which has no separate and independent child-placement agency, was "arbitrary, restrictive, unjust and invalid." (App. 46, 48)

The Secretary appealed from this decision to the Fourth Circuit Court of Appeals, which reversed the decision of the District Court, concluding that the statute and regulation were valid, and that benefits should be denied. The majority found no denial of equal protection because, it said, the wage earner's daughter could have "relinquished" Linda Gail to the Department of Welfare and thereby the provisions of the statute and regulation could have been complied with. (App. 52, 55) Circuit Judge Bryan, dissenting, would have affirmed the decision of the District Court because under the facts of this case, the regulation is "unwarrantably restrictive and arbitrary in excluding the adopting court from the statutory phrase 'public child-placement agency'." (App. 55-56)

SUMMARY OF ARGUMENT

Section 202(d)(8) of the Social Security Act, which denies benefits to children adopted by a wage earner after the wage earner qualifies for benefits, except under certain circumstances, violates the Fifth Amendment's guarantee of due process of law. The restriction discriminates against adopted children on the sole ground that they are adopted, for similarly situated natural children of wage earners are entitled to child's insurance benefits. The discrimination is not rationally related to any legitimate governmental interest and encroaches upon the specially protected realm of parent-child relationships. The statute discriminates by creating an

irrebuttable presumption as to most adopted children that they were adopted for the purpose of abuse. By permitting benefits to be paid only for after-born, after-adopted children whose adoption was supervised by a child-placement agency as well as a court, Section 202(d)(8)(E) of the Act deprives children in areas lacking child-placement services the equal protection of the laws.

The State of West Virginia has drafted its adoption laws to assure that adopted children will be, in every respect, treated under the law the same as natural children of their adopting parents. Section 202(d) of the Social Security Act conflicts with the State law without any substantial or constitutionally delegated federal interest.

The terms of Section 202(d)(8) conflict with the terms of Sections 202(d)(1) and 202(d)(3) of the Act. Since Linda Gail fulfilled the requirements of Sections 202(d)(1) and 202(d)(3) when she applied, she should be granted benefits.

The regulation of the Social Security Administration which excludes a juvenile court from the definition of a child-placement agency is unwarrantably restrictive.

ARGUMENT

I.

THE PROVISIONS OF SECTION 202(d)(8) OF THE SOCIAL SECURITY ACT CONFLICT WITH DECISIONS OF THIS COURT REGARDING THE GUARANTEES OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The provisions of Section 202(d)(8) of the Social Security Act, prior to the 1972 amendments, as interpreted by the Social Security Administration, created two kinds of discriminatory classifications: (1) they discriminated on their face between adopted children and natural children, and (2) they discriminated in practice against families in rural areas and other areas lacking child-placement facilities.[10]

This discrimination consisted essentially in the arbitrary and irrebuttable presumption, created by statute, that children adopted by disabled wage earners,

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[10]The 1972 amendments to Section 202(d)(8) removed the discrimination against families in areas lacking child-placement facilities by removing altogether the provisions of Section 202(d)(8)(E), permitting child's insurance benefits to be paid under certain circumstances to a child adopted by a disabled wage earner, even though the child had not lived with the wage earner prior to the time he became disabled. The effect of the 1972 amendments is to intensify the discrimination against adopted children, as compared with natural children. Under the 1972 amendments *no* adopted child can qualify for benefits as a dependent of his adopting parents unless he or she was born and was living with the adopting wage earner during the year before the adopting wage earner became disabled. Section 111, Public Law 92-603, 86 Stat. 1346 (October 30, 1972).

and not adopted within the provisions of Sections 202(d)(8)(D) or (E), were adopted for purposes of abuse. Prior to the 1972 amendments, adopted children who did not live with the wage earner before he became disabled were categorically denied benefits on the adopting parent's account, unless the adoption was supervised by a child-placement agency. There was no such denial to after born biological children of disabled wage earners.[11]

A. The Provisions of Section 202(d)(8) Discriminate Arbitrarily and Unconstitutionally Against a Class of Children Simply Because They Are Adopted.

In 1960, the Social Security Act was amended to provide child's insurance benefits to the natural children of disabled wage earners born after the wage earner had become disabled. Prior to the amendments all dependent children born after a wage earner became disabled were barred from benefits. The arbitrariness of this rule was recognized and the law was changed to permit benefits

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[11] The term "after-born" is used herein to refer to children born after the wage-earner became disabled and qualified for Social Security disability insurance benefits. The term "after-adopted" is used herein to refer to children adopted by the wage earner after the wage earner became entitled to disability insurance benefits. In this case petitioner's adopted daughter was both "after-born" and "after-adopted."

The 1972 amendments provided that *no* after-adopted child may qualify for benefits unless he or she was living with the wage earner for a year before he or she became disabled. A child born during that year must live with the wage earner, and be dependent upon him or her continuously from the date of birth. No provision is made for benefits for children like Linda Gail, born after the wage earner became entitled to disability insurance. Section 111, Public Law 92-603, 86 Stat. 1346 (October 30, 1972).

for after-born children. Section 201 of Public Law 86-778, 74 Stat. 924, amending Section 202(d)(1), 42 U.S.C. §402(d)(1) of the Social Security Act. [12]

It was at the time of the 1960 amendments that the distinction was first made between after-born natural and adopted children. The purpose of the change to include after-born children was explained as follows in Senate Report No. 1856 on The Social Security Amendments of 1960, 2 U.S. Cong. and Ad. News 3643 (Aug. 19, 1960).

> 8. *Correcting technical flaws in the law.*
>
> (a) Because of a technical defect in the law, benefits cannot now be paid in cases where a child of a disabled person is born or adopted after the worker becomes disabled, or where a child becomes a stepchild through a marriage occurring after the worker becomes disabled . . .

Neither in the Senate Report nor the Conference Report, Conference Report No. 2165, 2 U.S. Cong. and Ad. News 3749, 3753 (Aug. 25, 1960), is any explanation given for the reasons for discrimination against after-adopted children.[13] This distinction has been perpetuated from year to year since 1960.

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[12] The 1960 amendments amended Section 202(d)(1) to provide that an after-adopted child could qualify for benefits only if (1) the adoption was decreed within two years after the month the wage earner became entitled to disability benefits, and (2) the child had been living with the wage earner, or proceedings had been instituted to adopt the child in or before the month the wage earner became entitled to benefits.

[13] The House Report was not reprinted in the U.S. Cong. and Ad. News, and was not available to counsel for petitioner.

1. *The provisions of Section 202(d)(8) which discriminate against adopted children are not rationally related to any proper governmental purpose.*

As justification for the Act's discrimination against after-born adopted children, the legislative history contains, from time to time, the bare assertion that the purpose of the discrimination is to "prevent abuse."[14] Petitioner contends that the mere assertion that the purpose of a law is "to prevent abuse" does not, without more, constitute proof of a rational relationship to a legitimate governmental purpose. At no point in the legislative history does there appear any data, any expert testimony, any evidence of public debate or rational

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[14] Purpose was to provide "safeguards against abuse through adoption of children solely to qualify them for benefits. . . ." S. Rep. No. 404, 89th Cong., 1 U.S. Cong. and Ad. News 2048 (1965). Note that this was explaining a change in the rules relating to after-adopted children of retired workers, as opposed to disabled workers.

Purpose of amendments is to keep provisions relating to "after-adopted" children from being "unnecessarily complex" and include "safeguards against abuse through adoption of children solely to qualify them for benefits." Report of The Sen. Finance Committee on H.R. 1, Sen. Rept. No. 92-1230, 92d Cong., 2d Sess. (Sept. 26, 1972) at 141.

But cf., Purpose of modification "to make the requirements uniform" (as regards after-adopted children of retired as well as disabled workers). Rept. of Hse. Ways and Means Committee on H.R. 1 (1971), and purpose of modification "to make the requirements uniform" (as regards after-adopted children of disabled and retired workers). Conference Committee Report on H.R. 1, 92d Cong., 2d Session (Oct. 17, 1972), at 3.

And cf., Purpose of modification "to correct technical flaws." Sen. Rept. No. 1856 (Aug. 19, 1960), *supra*, p. 21.

discourse on the subject. And for good reason: There is no rational justification for the provision.

The only discourse of any kind about Section 202(d)(8) which counsel for petitioner could find was the 1967 Senate floor debate on amendments to Section 202(d)(8). Every senator who spoke on the proposed amendment referred to the harsh and unfair results of the restrictions on benefits to after-adopted children. Senator Allott, the sponsor of the amendment, referred to the "unyielding and arbitrary fashion in which the bill had been drafted." According to Senator Allott,

> . . . Experience has shown, however, that this concern over the possible abuse of the law with regard to adopted children was never justified, and that this limitation has created undue hardships and difficult circumstances for the bona fide efforts of disabled persons to find some financial assistance from social security after they have adopted children. Arbitrary laws can lead to inequitable and oftentimes absurd results. This has certainly been the experience with this particular provision of the Social Security Act.[15]

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[15] 113 Cong. Rec. 33196 (Nov. 20, 1967). Later in the debate Senator Allott offered the following example to demonstrate the unfairness of the discrimination:

> Frankly, this was brought to my attention by the very unfortunate case of a veteran who became disabled in 1957 and was a quadriplegic, meaning that he has no use of either arms or legs.
>
> He was married in 1964. More than 2 years after that, his adopted child is unable to receive these benefits that natural children rece[illegible].

Ibid., at 33197.

Senator Allott also indicated that budgetary considerations are not a significant reason for the discrimination against adopted children. Although his testimony did not make clear the number of after-adopted children he thought would become eligible for benefits as a result of his amendment, Allott presented evidence from the chief actuary of the Social Security Administration that the cost of extending eligibility to after-adopted children "would be negligible."[16]

Senator Allott's testimony was supported by Senator Dominick, who said,

> I think it would correct inequities which have been in the section up to date. I can foresee and as a matter of fact know, of certain cases where families with both adopted and natural children under these types of circumstances find that they can get benefits for their natural children and cannot get them for adopted children. It does not seem to me that this is equitable or fair.[17]

and by Senator Curtis, who said,

> It so happens that I know of at least two occasions on which, in all good faith, small children have been adopted and a hardship has been worked.[18]

No evidence appears in the legislative history, or anywhere else, that adoptions would be granted contrary to the interests of the children involved, or to the interests of the government if the restrictive provisions of Section 202(d)(8)(D) were removed. To the contrary, the Senate Finance Committee has recently expressed its

[16] *Ibid.*, at 33196.

[17] *Ibid.*, at 33196.

[18] *Ibid.*, at 33197.

belief "that most adoptions are undertaken to obtain for a child the legal and psychological advantages of adoption within a close family group and that it is inappropriate to deprive the child of his social security benefits when he is adopted." Comment on Section 112 of H.R. 1, Report of The Senate Finance Committee on H.R. 1, Sen. Rept. No. 92-1230, 92d Cong., 2d Sess. (Sept. 26, 1972) at 141.

This opinion is buttressed by judicial comment in many of the cases which have reviewed the denial of benefits to after-adopted children in circumstances similar to the circumstances in this case. Opinions discussing the provisions which deny benefits to after-adopted children have frequently reflected their arbitrariness and their failure to have any rational relationship to their purported purpose of preventing abuse. See, *e.g.*, *Gillums* v. *Secretary of Health, Education and Welfare*, 331 F. Supp. 204, 207 (D. Md. 1971) (No evidence of bad motives; "to the contrary, the evidence is admitted to show good faith on the part of the claimant."); *Hagler* v. *Finch*, 451 F.2d 45, 48 (9th Cir. 1971); *cert. den.*, 31 L.Ed.2d 805 (1972) ("Consuela's adoption does not appear to have been motivated by any thoughts of economic gain. The Haglers, lacking guidance through the statutory maze of Section 402(d), have wandered into a trap designed to snare only the undeserving."); *Keys* v. *Richardson*, 325 F. Supp. 459 (E.D. Tenn. 1971) (benefits denied "reluctantly"); *Craig* v. *Finch*, 425 F.2d 1005, 1006 (5th Cir. 1970) ("[C]ase is factually appealing in favor of an award"); *Rowe* v. *Finch*, 427 F.2d 417, 419, n. 3 (4th Cir. 1970) ("We do not mean to suggest that there is any evidence that there was such motivation [to increase the public support available to the family unit] in this case"); *Glaze* v. *Richardson*, 438 F.2d 120 (5th Cir. 1971) ("The District Court viewed this as a deserving case").

Counsel for petitioner has been able to find evidence of only one case in which the sole or primary motivation for seeking the adoption was to increase Social Security benefits for the family unit. In that case, the adoption was *denied by the Court. Gutierrez* v. *New Mexico Dept. of Public Welfare*, 74 N.Mex. 273, 393 P.2d 12 (1964). In its opinion the court cited several cases standing for the principle that an adoption may not legally be granted for a financial purpose alone, in the absence of proof that the adoption would also be in the best interests of the child's emotional and physical well-being. This is not the law solely in New Mexico, but throughout the United States. Adoption law in the United States is summarized as follows at 2 Am. Jur. 2d *Adoption* §61 (1962):

> In determining whether to grant a decree or order for the adoption of a minor child, the interests and welfare of the child are of primary and paramount consideration. *On this point there is unanimous agreement.* Before granting a decree of adoption proceedings, the court must first determine that the best interests of the infant will be served and promoted by the change in status. (Emphasis added.)

In other words, in order to demonstrate the need for a restrictive provision for the purpose of preventing "abuse" through adoptions, Congress would have to have had *some* evidence that the Courts were unable or unwilling to fulfill their paramount statutory duty with respect to adoptions. There was no such evidence.

The fact that a person considers the likelihood that some action he takes will establish eligibility for insurance benefits is not interpreted as abuse with regard to other sections of the Social Security Act. In the case of a man who entered into an employment contract for

the purpose of establishing sufficient quarters to entitle him to benefits, the District Court said in *Rafal* v. *Flemming*, 171 F. Supp. 490, 492 (E.D. Va. 1959),

> It is conceded by all parties that there is nothing improper or questionable about a person entering bona fide employment for the express purpose of acquiring a wage record which will enable him to qualify for an old-age insurance benefit, and that such action is clearly within the spirit, as well as the letter of the law.

The Court said in *Rafal* that the issue was whether there had been bona fide employment. *Accord*, *Foss* v. *Gardner*, 363 F.2d 25, 27 (8th Cir. 1966) (no bona fide employment on the facts, but "the fact that a motive of the claimant was to obtain Social Security benefits would not, standing alone, be fatal to her establishing a claim of employment."); *Cody* v. *Ribicoff*, 289 F.2d 394 (8th Cir. 1961); *Sabbagha* v. *Celebreezze*, 345 F.2d 509 (5th Cir. 1965); *Scott* v. *Celebreezze*, 241 F. Supp. 733 (S.D. N.Y. 1965) (evaluating a transfer of a business and awarding benefits). What holds true for other sections of the Act, must apply as well to adoptions. The mere fact that an adopting parent may have considered the fact that the adoption will increase the amount of the family's benefits does not amount to "abuse" where the adoption is, in other respects, in the best interests of the child. And, as set forth, *supra*, p. 26, the courts must assure that the adoption is, in other respects, in the best interests of the child.

In the case at bar, as with many other similarly situated families, the expectation of child's insurance benefits for the adopted child was not even a factor; for at the time the wage earner took responsibility for the support of Linda Gail, the Act had been interpreted to deny benefits to after-born, adopted children.

The argument that Section 202(d)(8) is necessary to prevent "abuse" in the form of spurious adoptions is reminiscent of the argument that maximum family grants are necessary to keep welfare mothers from having a lot of babies for the purpose of increasing their welfare checks. *Dandridge* v. *Williams*, 397 U.S. 471, *reh. den.* 398 U.S. 914 (1970). Whatever the theoretical merits of this claim with regard to the bearing of children (and it should be noted that this Court did *not* cite this claim as a rational basis for the Maryland maximum grant system), the situation in this case differs markedly from the "family planning" argument. In the first place, Congress, while restricting benefits to after-born adopted children, has provided for benefits to the far more numerous class of after-born natural children. No claim is made that disabled or retired wage earners will conceive more children in order to augment the family's benefit check. And yet if there were to be any concern for abuse, it should rationally be directed at the after-born children. After all, an adoption cannot take place without court supervision, but no court decree is needed to assure that conception and birth will be in the best interests of a child.[19]

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[19]With regard to this argument, it should go without saying that parents who bear *or* adopt a child take on a set of obligations and responsibilities, which may last a lifetime and which will certainly last for many years. These responsibilities involve huge investments of time and emotion, as well as the things money can buy. The assumption is far-fetched that any adopting parents would stand to gain in a transaction where their only recompense would be the modest monthly child's insurance benefit. Senator Allott, the sponsor of the 1967 amendment to Section 202(d)(8), argued that the benefits at stake were too small to invite abuse:

> . . . A benefit of $32.29 per month to help support a child is not going to tempt one to abuse the law in order to adopt a child. Surely the cost of raising a child is more than this, particularly for those disabled persons who sustain so much more in the way of hardship and expense.

Had Congress been genuinely concerned with finding a rational solution to the supposed problem of abuse, they would not have drawn a firm line at the point of the wage earner's qualification for benefits. Even in America, old age, or, in the alternative, death, is predictable. In the coal-mining region of West Virginia where Mr. Morris lives, disability prior to retirement may even be said to be probable, if not predictable, among laboring persons. A family who would adopt a child after the wage-earner had qualified for benefits, for the sole purpose of pecuniary gain in the form of child's insurance benefits, might just as well adopt a child while the wage earner was still working, in anticipation of the fact that the wage earner would soon be qualified for benefits. In fact, the financial security provided by an established Social Security record may be one factor among many considered when grandparents adopt the out-of-wedlock child of their daughter or son. However, such considerations of financial security are at least as likely, probably moreso, to be considered while the wage earner is still working. Yet no one has suggested that children adopted prior to the period of disability should be disqualified from benefits.

As cited above, *supra*, p. 21, the original purpose of the 1960 amendment was to correct a "technical flaw" which had prevented payment of benefits to after-born children of wage earners. But the amendment perpetuates the flaw with respect to after-born, after-adopted children. No presumption of abuse can arise from the fact that a child, later adopted by a wage earner, was not living with the wage earner at the time he or she qualified for

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113 Cong. Rec. 33196 (Nov. 20, 1967). Although the monthly benefit rate has increased somewhat since then, so has the cost of living.

benefits if the child was not born at the designated time. In the case of a child, such as Linda Gail, born several years after the adopting parent qualified for benefits, it is absurd to infer abuse, or even the possibility of abuse, from the fact that the child did not live with the wage earner in the years prior to birth. If the adoption of children like Linda Gail, by parents like Mr. and Mrs. Morris is the kind of "abuse" Congress was trying to prevent,[20] then this Court must conclude that there was no proper governmental purpose to the restriction.

2. *The discrimination against adopted children embodied in Section 202(d)(8) is contrary to the due process clause of the Fifth Amendment to the Constitution of the United States.*

In recent years this Court has dealt several times with the constitutionality of laws which denied benefits to parents or children on the basis of a legal classification of a child. In a series of cases dealing with children born out of wedlock (and therefore classified "illegitimate"), this Court has wrestled with the question of what kinds of legislative distinctions between "legitimate" and "illegitimate" children amount to constitutionally prohibited discrimination. *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968); *Labine* v. *Vincent*, 401 U.S. 532 (1971); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).[21]

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[20]A review of the cases which have challenged the denial of benefits to after-adopted children, indicates that the case at bar is a typical claim.

[21]All of these cases except *Labine* held that there was unconstitutional discrimination, and were decided in favor of the granting of benefits. The *Labine* case was distinguished in the majority opinion of *Weber* on the grounds that:

While all of these cases involved the impact of the Equal Protection Clause of The Fourteenth Amendment upon a state statute, the reasoning of those cases is apposite to the case at bar. Although there is no explicit equal protection guarantee in the Constitution applicable to the federal government, equal protection standards have been imported into the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Shapiro* v. *Thompson*, 394 U.S. 618, 641-2 (1969); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971).

In *Weber* v. *Aetna Casualty*, *supra*, the most recent of this Court's decisions regarding denial of benefits to children born out of wedlock, Mr. Justice Powell, in the majority opinion, reviewed the reasoning of the Court's decisions, starting with *Levy*.

> The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. [Citations omitted] Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. [Citations omitted] The essential inquiry in all the foregoing cases is,

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That decision reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders. *Weber*, 31 L.Ed.2d at 776.

This reasoning operates in favor of petitioner in the instant case. As set forth more fully, *infra*, Part II, the federal law here has infringed the State prerogative to regulate matters of domestic relations. *Stanley* v. *Illinois*, 405 U.S. 645, 31 L.Ed.2d 551 (1972), which raises related issues, is considered separately herein.

> however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger? *Weber*, 31 L.Ed.2d at 777.

In applying these principles to the facts of *Weber*, the Court found that the denial of workmen's compensation benefits to unacknowledged illegitimate children of an employee, under certain circumstances, did not substantially promote any legitimate state interest. The Opinion further indicated that a restriction based on the legal classification of a "hapless" child on the basis of his or her "status of birth" was repugnant:

> But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong-doing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. *Weber*, 31 L.Ed.2d at 779.

Since the decision in *Weber*, at least two three-judge courts have followed the reasoning of that case to hold that a provision in Section 203(a) of the Social Security Act which discriminates against certain illegitimate children by denying them benefits violates the Due Process Clause of The Fifth Amendment. *Davis* v. *Richardson*, 342 F. Supp. 588 (D. Conn. 1972); *Griffin* v. *Richardson*, 346 F. Supp. 1226 (D. Md. 1972).[22] The provision at issue permitted certain illegitimate children

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[22] *Accord*, *Maracle* v. *Richardson*, 2 CCH Pov. Law Rep. ¶16,137 (Sept. 21, 1972).

to be awarded benefits only if other eligible children of the beneficiary had not exhausted the maximum family allowance.

The illegitimacy cases are relied on here for their reasoning with respect to the constitutional principles involved because there are substantial similarities between discrimination against children born out-of-wedlock and the discrimination involved here against adopted children. While at first glance, the parent-child relationship involved in adoption may appear to be the opposite of the relationship between a child born out-of-wedlock and his or her father, in fact the two are similar kinds of socio-legal classifications. Although difficult to recognize because of our society's assumptions about families, it is essentially a socio-legal classification to call the biological parents of a child the "real" or "actual" parents; such an application could conceivably be given to the adult or adults who in fact provide maintenance, love, and support to the child, regardless of biological relationship. An illegitimate child is so classified and distinguished from other children because of the circumstance that his or her biological parents did not marry.

An adopted child is so classified and distinguished from other children because of the circumstance that his or her biological parents are not the parents who provide him or her with nurturance, support, love and protection.

In the case of most adopted children, as with children born out-of-wedlock, the fact that they have been adopted is completely unrelated to their own choice, fault, action, or—frequently—their knowledge. To penalize a child for the fact that he or she is adopted is frequently as arbitrary and misdirected as to penalize a child for the fact that he or she is born out-of-wedlock.

The government has sought to justify the discrimination involved here by saying that it will provide a safeguard against abuse by adopting *parents.* But as the *Weber* opinion states explicitly, and the other cases about benefits for illegitimate children imply, a discrimination which denies benefits to a child, punishes the child, not the parents. Linda Gail was an infant when she was placed in the home of Mr. and Mrs. Morris. She is no more responsible for the fact that she is adopted than were the plaintiff children in the *Weber* case responsible for the fact that they were born out-of-wedlock. Yet, as in *Weber, Levy, Griffin, Davis,* and the other cases cited, a denial of benefits serves primarily to penalize the child.

The *Weber* case, like the *Griffin* and *Davis* cases, did not involve a restriction of benefits for *all* children born out-of-wedlock. Similarly, Section 202 of The Social Security Act does not deny benefits to *all* adopted children. Nevertheless, in the illegitimacy cases the fact that the plaintiffs had received nothing for the sole reason that they were born out-of-wedlock constituted an unlawful discrimination. Similarly, here, the fact that the Act provides benefits for *some* adopted children does not preclude a finding that *other* children, such as Linda Gail, have been unconstitutionally denied benefits for the sole reason that they are adopted.

The illegitimacy cases provide a framework for analyzing the issues in this case from the point of view of constitutional requirements of equal protection. However, as the Court observed in *Griffin* v. *Richardson,* 346 F. Supp. at 1233,

> An analysis of these cases does not clarify the precise standard to be used in the case at bar.

The opinion in *Weber* leaves open the question of whether the standard for evaluating the classification is

the "strict scrutiny" standard applied when the classification "approach[es] sensitive and fundamental personal rights," or the less stringent standard which requires "that a statutory classification bear some rational relationship to a legitimate state purpose." *Weber*, 31 L.Ed.2d at 777. In the *Weber* opinion, the Court implied that a two-step inquiry should be made in equal protection cases:

> The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger? *Weber*, 31 L.Ed.2d at 777.

As discussed at length, *supra*, Part I(A)(1), the classification does not promote any legitimate state interest. In this case, as in the illegitimacy cases, the child is punished for the supposed wrong-doing of the parents. Furthermore, the fact that a child is adopted, rather than natural born, bears no rational relationship to the issue of whether the child was brought into the family for purposes of abuse (if anything, the required court hearing gives a protection against abuse in adoption which is lacking in cases of natural born children).

In this case, as in the illegitimacy cases, relationship between parent and child is involved. In *Levy* v. *Louisiana*, the Court characterized these rights as involving "the intimate, familial relationship between a child and his own mother." 391 U.S. at 71. Under the law of West Virginia, the adopting parents become the child's "own" parents. The implication of *Levy*, and it was so interpreted by Justice Rehnquist, dissenting in *Weber*, 31 L.Ed.2d at 780-2, was that the intimate family relationships between parent and child were the kind of "fundamental personal rights" which could not be abridged in the absence of compelling state interest.

The statutes denying benefits to illegitimate children denied benefits because conception of a child out of wedlock violates certain social and legal precepts about the family; by contrast, the federal law being challenged here discriminates against adopted children even though the statutes of West Virginia, as well as the other states, promote and protect adoption where it is in the best interests of the child. In this case, as in the illegitimacy cases, the purpose of the statute is to provide support to close relatives and dependents of a wage earner who has lost his capacity to provide support. In this case, the child is as fully and actually dependent on the parent as were the children in the illegitimacy cases, and as the natural after-born children who are granted benefits by the terms of Section 202 of the Act. In this case, the state interest in family relationships is not served by the federal law which conflicts with it (See Part II, *infra*); in the illegitimacy cases, the state interest in family relationships was not served by the state statute which this Court held unconstitutional.

This Court followed a somewhat different line of reasoning in *Stanley* v. *Illinois*, 405 U.S. 645, 31 L.Ed.2d 551 (1972), but one which is applicable to this case. The issue in *Stanley* was cast in terms of whether an irrebuttable presumption of Illinois law violated the Equal Protection Clause. Illinois law provided that children born out of wedlock automatically became wards of the State upon the mother's death; the basis for this was a presumption on the part of the State that unwed fathers are unfit to raise their children. This presumption was irrebuttable prior to the State's taking custody of the children. *Stanley*, 31 L.Ed.2d at 556. This Court held that by categorically denying an unwed father the right to a hearing in which he could demonstrate his

fitness to have custody of his children, even though other parents were granted the right to a hearing before their children were removed from their custody, Illinois deprived Mr. Stanley of the right to due process and equal protection of the laws.

In reaching this conclusion, the Court acknowledged that "due process of law does not require a hearing 'in every conceivable case of governmental impairment of private interest' (citations omitted)." *Stanley*, at 31 L.Ed.2d 558. One reason for finding the requirement of a hearing in this case was that the relationship between parent and child was involved. The Court found a specially protected interest in the relationship of parent and child:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 95, 93 L.Ed. 513, 527, 69 S.Ct. 448, 10 ALR 2d 608 (1949) (concurring opinion).
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> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 67 L.Ed. 1042, 1045, 43 S.Ct. 625, 29 ALR 1446 (1923), "basic civil rights of man," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541, 86 L.Ed. 1655, 1660, 62 S.Ct. 1110 (1942), and "[r]ights far more precious . . . than property rights," *May* v. *Anderson*, 345 U.S. 528, 533, 97 L.Ed. 1221, 1226,

73 S.Ct. 840 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can either supply nor hinder." *Prince* v. *Massachusetts*, 321 U.S. 158, 166, 88 L.Ed. 645, 652, 64 S.Ct. 438 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska*, *supra*, at 399, 67 L.Ed. at 1045, the Equal Protection Clause of the Fourteenth Amendment, *Skinner* v. *Oklahoma*, *supra*, at 541, 86 L.Ed. at 1660, and the Ninth Amendment, *Griswold* v. *Connecticut*, 381 U.S. 479, 496, 14 L.Ed.2d 510, 522, 85 S.Ct. 1678 (1965) (Goldberg, J., concurring). *Stanley*, 31 L.Ed.2d, at 558-9.

Although not explicitly articulated, a further reason for requiring a hearing in this case was apparently the nature of the issue to be resolved. In *Stanley*, the issue to be resolved was the fitness of a father to provide a good home for his children. In *Bell* v. *Burson*, 402 U.S. 535 (1971), in which a hearing was held to be constitutionally required before suspension of a driver's license, the issue to be resolved was fault in driving. In *Carrington* v. *Rash*, 380 U.S. 89 (1965), the issue was the good faith intention of a serviceman to satisfy the requirements of Texas law as to residency. In *Reed* v. *Reed*, 404 U.S. 71 (1971), the issue was the relative qualification of relatives of the deceased to be appointed administrators of an estate. In each of the foregoing cases, a prior hearing, or its functional equivalent, was held to be constitutionally required. A common thread running through all these cases is the fact that the issue to be resolved involved judgments about individual motivation, individual state of mind or individual capability. The governmental

interests which justified the restriction being challenged in each case depended upon a judgment about individual motivation and circumstance. This kind of judgment could not be made on a categorical basis. Therefore, since fundamental personal rights were at stake, this Court held that an opportunity for a hearing was required by the Due Process Clause.

This case involves an irrebuttable presumption very like the presumptions which were challenged in *Carrington, Reed,* and *Stanley.* The presumption here is that children adopted by a wage earner already receiving disability insurance benefits were adopted for the purposes of abuse unless the adoption happened to meet the fact requirements of Sections 202(d)(8)(D) or (E).

In this case, as in *Stanley,* the specially protected area of relationships between parent and child is involved. As argued more fully above, adopted children are equally entitled with biological children to protection of the relationship with their parents. The fact that most of our family relationships are based on biological kinship is a socio-legal choice of this society. However, recognition of adoption is so firmly entrenched in our laws and in our custom that it cannot be argued that the protected sphere of family relationships is limited to biological kinship. Adopted children too are entitled to share in the special deference given to parent-child relationships.

As in *Stanley, Carrington, Reed,* and *Bell* v. *Burson,* the central issue involves a question of individual motivation. The government justifies denying benefits to Linda Gail and other similarly situated children by presuming that all those children were adopted for purposes of abuse. As explained at length, *supra,* Pt. I(A)(1), this is an unwarranted presumption in most

cases. In every case, motivations are imputed to families without any meaningful opportunity for the family to rebut them.

At least in *Stanley* the father was given an opportunity at some point to prove his fitness as a father by petitioning for custody of his children. The defect in the Illinois procedure was that he should have had the chance for a hearing before ever losing custody. The irrebuttable presumption in the instant case is more like the presumptions in *Carrington* and *Reed.* Here there is no opportunity at any point for the wage earner or child to rebut the presumption that the adoption was for purposes of abuse and thereby qualify for benefits.

B. The Requirement of Supervision by a Child-Placement Agency, When Interpreted To Exclude a Juvenile Court, Denies Certain Adopted Children Like Linda Gail Due Process of Law.

Linda Gail was denied benefits, not because of any legal impediment to her adoption, but because the adoption was not supervised by a child-placement agency. (App. 40, 44-45) Most of the reasons elaborated in Part I(A)(1), *supra,* showing that the discrimination against adopted children is not rationally related to any legitimate governmental purpose, apply equally to the arguments concerning supervision by a child-placement agency. To the reasons listed there, the following reasons may be added to demonstrate that the requirement of supervision by a child-placement agency is not rationally related to any legitimate governmental purpose:

1. The requirement is completely superfluous. Before any adoption may be granted in West Virginia, as well as in other states, the Court must specifically find that the adoption will be in the best interests of the child. Section 48-4-3, West Virginia Code (Michie's 1966). At the time of the adoption in this case, the Court was required to appoint a discreet and suitable person to investigate the merits of the adoption and report to him in writing. Section 48-4-3, West Virginia Code (Michie's 1966). The requirement that a separate child-placement agency investigate the very matters upon which the Court must rule is an insult to the juvenile judges of this county; it is based on a totally unwarranted assumption that the courts will generally not do their job. The argument of expertise does not militate in favor of independent and duplicative supervision by a child-placement agency. Certainly juvenile court judges have as much experience in the area of problems of juvenile placements as do most social services agencies. Furthermore, most judges have much longer tenure in their jobs, and more years of experience than the social workers who staff most public and private child-placement agencies. This is particularly true for rural counties, such as petitioner's home county, where the only child-placement agency is the Department of Welfare (App. 34, 55), where case workers frequently lack social work training, and where staff turnover is high.

2. Supervision by the Department of Welfare is inappropriate or burdensome in many cases. Particularly in rural areas where it is likely to be one of the only agencies available to meet a broad range of social problems, the Department of Welfare is typically overworked and understaffed. Petitioner concedes that the Department of Welfare does serve as a public

child-placement agency in some adoptions. These are adoptions where the Department has been granted custody. Section 49-3-1, West Virginia Code (Michie's 1966). However, as the opinion of the Court of Appeals states, the child would have to be "relinquished" to the custody of the Department of Welfare. (App. 55) This is a completely unnecessary step in the case of intra-family adoptions, such as the one involved in this case, and in many others where benefits have been denied. Furthermore, the requirement of Welfare Department involvement in intra-family adoptions is a wholly unnecessary burden for local Welfare Departments, which are already overburdened with high caseloads of people genuinely in need of state involvement and supervision. Chances are that Welfare Department supervision would be extremely cursory in any event in most intra-family adoptions. Furthermore, many families will be extremely reluctant to "relinquish" their children to the Welfare Department because of the opprobrium associated with Welfare Department custody on account of the Department's frequent involvement in neglect and abuse cases, and because of fear that the child would not be returned to the family.

The adoption of Linda Gail occurred over a year before the 1967 Amendments, which added the requirements of supervision by a child-placement agency. Thus Mr. and Mrs. Morris had absolutely no reason to consider the unwieldy procedure of seeking Welfare Department supervision of the adoption. Yet the Act creates the presumption as to them, equally with persons who had notice of the requirement, that the adoption was for purposes of abuse. Even after the passage of the 1967 amendment, many families proceeded with adoptions without child-placement agency supervision

because their attorneys were ignorant of the requirement, or misunderstood it. The requirement of child-placement agency supervision has received little publicity, and many attorneys have learned about it only *after* a client failed to qualify for child's insurance benefits. For these families, too, the presumption of abuse, simply because they failed to seek child-placement agency supervision, is unreasonable.

The constitutional principles of due process and equal protection discussed at Part I(A)(2), *supra*, are applicable to the requirement of child-placement agency supervision, and will not be repeated here.

For the reasons already discussed, the denial of benefits to after-adopted children on the grounds that the adoption was not supervised by a child-placement agency denies these children the equal protection of the law and rights to due process guaranteed by the Fifth Amendment to the Constitution of the United States.

II.

BY DISCRIMINATING BETWEEN ADOPTED CHILDREN AND NATURAL CHILDREN AND BY CREATING AN ON-GOING LEGAL RELATIONSHIP BETWEEN AN ADOPTED CHILD AND HIS NATURAL PARENT WHICH CONTINUES AFTER THE ADOPTION, THE FEDERAL GOVERNMENT ARBITRARILY AND UNCONSTITUTIONALLY INTERFERES WITH WEST VIRGINIA'S LAWS GOVERNING ADOPTION.

The legislature of West Virginia, like the legislatures of other states, has taken great pains to assure by its statutory scheme that adopted children will stand in *every legal respect* in the same relationship to their adopting parents as natural legitimate children of the

same parents. Among the elements of this statutory scheme are careful and elaborate provisions for nondisclosure of the fact that a child is an adopted, rather than a natural child;[23] provision for changing the name of the child in the adoption decree;[24] provision for mandatory issuance of a new birth certificate;[25] complete substitution of reciprocal rights of inheritance from the adopting parents for reciprocal rights of inheritance from the natural parents;[26] and complete transfer of the duty of support and maintenance from the natural parents to the adopting parents. Section 48-4-5 of the West Virginia Code (Michie's 1966), *as amended* (Supp. 1972) summarizes this complete transfer of rights and duties as follows:

> Upon the entry of such order of adoption, the natural parent or parents . . . shall be divested of all legal rights, including the right of inheritance from

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[23]Section 48-4-4, West Virginia Code (Michie's 1966), *as amended* (Supp. 1972); Section 16-5-18, West Virginia Code (Michie's 1972). See also 2 Am. Jur. 2d, Adoption §88 (1962): ". . . the tendency of modern legislation is to place an adopted child as far as possible and to all intents and purposes, in the same position as a natural child."

[24]Section 48-4-3, West Virginia Code (Michie's 1966), *as amended* (Supp. 1972).

[25]Sections 16-5-16 and 16-5-18, West Virginia Code (Michie's 1972); Section 48-4-4, West Virginia Code (Michie's 1966), *as amended* (Supp. 1972).

[26]Section 48-4-5, West Virginia Code (Michie's 1966), *as amended*, (Supp. 1972). West Virginia law follows the pattern of modern adoption statutes which terminate "absolutely all legal relations between the adopted child and his natural parents . . .," and substitute for these full legal rights and responsibilities of parent and child between the adopted child and his adopting parents, 2 Am. Jur. 2d, Adoption §83, 87 (1962).

> or through the adopted child, under the statutes of descent and distribution of this State, and shall be divested of all obligations in respect to the said adopted child, and the said adopted child shall be free from all legal obligations, including obedience and maintenance, in respect to any such parent or parents. From and after the entry of such order of adoption, the adopted child shall be, to all intents and for all purposes, the legitimate issue of the person or persons so adopting him or her and shall be entitled to all the rights and privileges and subject to all the obligations of a natural child of such adopting parent or parents.

That section echoes the requirements of Section 48-4-3 that the adoption order shall state that

> . . . from the date of such order, the rights, duties, privileges and relations, theretofore existing between the child and his or her parents, shall be in all respects at an end, and that the rights, duties, privileges and relations between the child and his or her parent or parents by adoption shall thenceforth in all respects be the same, including the rights of inheritance, as if the child had been born to such adopting parent or parents in lawful wedlock, except only as otherwise provided in this article.[27]

In addition, in West Virginia law, adoptions are irrevocable except under certain unusual circumstances.[28]

The Social Security Act, as amended at the time of the application for benefits in this case, and, as further

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[27]Section 48-4-3, West Virginia Code (Michie's 1966), *as amended* (Supp. 1972). The only exceptions in the article pertain to revocation of an adoption under certain unusual circumstances.

[28]Section 48-4-6, West Virginia Code (Michie's 1966), *as amended* (Supp. 1972).

amended by the Social Security Amendments of 1972, interferes and conflicts with West Virginia's statutory scheme of adoption in at least three respects:

1. By distinguishing between adopted children and natural children of the wage earner, Section 202(d)(8) of the Act jeopardizes, and, in fact, directly violates the provisions of West Virginia law which protect against disclosure of the fact that a child is adopted unless the natural, or the adopting parents themselves choose to make this disclosure.

2. By providing that an adopted child may continue to draw such benefits, if any, as he or she was entitled to as the dependent child of his or her natural parents, Section 202(d)(1) of the Act resuscitates a legal and financial relationship with the natural parent which West Virginia law explicitly terminates.

3. By failing to treat an adopted child of a disabled wage earner "to all intents and for all purposes [as] the legitimate issue of the person or persons so adopting him," as mandated by Sections 48-4-4 and 48-4-5 of the West Virginia Code, as amended. Section 202(d)(8) of the Act denies benefits to after-born children in violation of West Virginia law.

As demonstrated above, Part I, no rational reason exists for these interferences with the state's plan for relationships between parents and their adopted children. Certainly no issue of commerce, of protected rights, of due process exists. No issue of conflict of laws or full faith and credit exists such as justified this Court's intervention in the area of domestic relations in *Williams* v. *North Carolina*, 317 U.S. 287 (1942). Congress could have provided for adopted children to be treated the same as natural children of their adopting parents, as of

the date of the adoption decree, thus keeping the Social Security Act consistent with State law. Or, Congress could have left the matter open-ended, as they have elsewhere in the Social Security Act, to be determined in a manner which is consistent with each State's domestic relations law or intestacy law.[29]

It is, of course, established without doubt that Congress has the power to set up a national social insurance system. It is, however, even more firmly established, that the powers of the federal government are limited powers, and that the federal government may not, without explicit Constitutional authority, interfere with a State's law-making authority.

When a State's sovereignty is to be infringed by the federal powers, particularly in an area such as adoption which has always in this country been a matter of plenary state power, some good reason for this infringement arising from a power enumerated in the U.S. Constitution must appear.[30] Here, no good reasons appear; the purposes of the Act would be served as well, or better, by a rule treating alike similarly situated natural and adopted children of insured wage earners. Where no constitutionally based reason exists for an interference with State sovereignty, the Constitution forbids the interference.

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[29]See, *e.g.*, 42 U.S.C. §416(h)(2)(A).

[30]Compare, in this regard, the Court's reasoning in *Labine* v. *Vincent*, 401 U.S. 532 (1972), one of the illegitimacy cases relied on above, Pt. I(A)(2). In that case, the Court upheld a Louisiana intestacy law in major part because of "the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders," as reviewed in *Weber* v. *Aetna Casualty & Surety Co.*, 31 L.Ed.2d 768, 776 (1972).

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III.

SINCE LINDA GAIL SATISFIED ALL THE REQUIREMENTS OF SECTIONS 202(d)(1) AND 202(d)(3) TO QUALIFY FOR BENEFITS, SHE SHOULD NOT BE BARRED FROM BENEFITS BY THE PROVISIONS OF SECTION 202(d)(8).

In his decisions, the hearing examiner explained he was of the opinion that Linda Gail had qualified for benefits because she had complied with all the requirements of Sections 202(d)(1) and 202(d)(3), which contain no provisions excepting or excluding adopted children from their terms. Linda Gail had filed an application for benefits [Section 202(d)(1)(A)]; was unmarried and under the age of eighteen [Section 202(d)(1)(B)]; and was dependent upon a disabled wage earner at the time of the filing of her application for benefits [Section 202(d)(1)(C)]. By the terms of Section 202(d)(1), a child who meets these requirements "*shall* be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits . . ." (emphasis added). In case there should be any questions about whether an adopted child is dependent upon the adopting parent for the purposes of Section (d)(1)(C), Section (d)(3) provides that "A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) unless, at such time, such individual was not living with or contributing to the support of such child and–(A) such child is neither the legitimate nor adopted child of such individual, or . . ." Linda Gail meets this requirement since she was living with Mr. and Ms. Morris at the time of her application for benefits, and was their adopted child.

Section 202(d)(1) is written in manadatory terms: a child who meets the requirements set forth therein *shall* be entitled to benefits. Linda Gail met all the requirements. Therefore, reasoned the hearing officer, she should be entitled to benefits. (App. 18-19, 37-38)

The hearing officer reasoned that, since the provisions of Section (d)(8) were in direct conflict with the provisions of Sections (d)(1) and (d)(3), he should resolve the contradiction by following the rule of statutory construction that the Social Security Act is to be construed liberally in favor of the granting of benefits. (App. 19)

The purpose for providing child's insurance benefits in the Social Security Act was to provide a means of support to the dependent children of a wage earner if the wage earner was unfortunate enough to become disabled and unable to support them himself. The purpose of the disability insurance program was to provide an income to the families of disabled wage earners so that they could participate modestly, but fully, in American life. There was no intention on the part of Congress to restrict disability insurance beneficiaries, as a condition of eligibility, from rights and activities open to other citizens, such as the adoption of children. Yet, that is the effect of a restrictive interpretation of Section 202(d)(8). The purpose of the 1960 Amendments to Section 202 of the Social Security Act was to correct the inequities of the earlier provisions of the Act which had denied benefits to after-born natural *and* adopted children. Sen. Rept. No. 1856 (Aug. 19, 1960), *supra*, p. 19. Yet, a restrictive interpretation of Section 202(d)(8) perpetuates the inequities with respect to adopted children.

The rule of liberal construction "is that by which the letter of the statute is enlarged or restricted so as more effectually to accomplish the purpose intended." 3 Sutherland, Statutory Construction (3rd ed.) §5504, p. 39. According to Sutherland, the construction given to a section of a statute should be the construction most consistent with the overall purposes of the statute.

Here, where there is a direct conflict between the terms of one section of the statute and another section, the section which is consistent with the purposes of the Act and with coverage should be adopted.

IV.

SECTION 404.323 OF SOCIAL SECURITY REGULATION NO. 4 IS AN ARBITRARILY RESTRICTIVE INTERPRETATION OF THE MEANING OF "CHILD-PLACEMENT AGENCY" IN SECTION 202(d)(8)(E) OF THE SOCIAL SECURITY ACT.

The legislative history of Section (d)(8)(E), which permits payment of child's insurance benefits to after-adopted children if the adoption was supervised by a child-placement agency, clearly indicates that this section was intended to be a remedial measure. The quotations from the floor debate, *supra*, pp. 23 and 24, accurately represent the tenor of the comments of the amendment's sponsors and supporters. (No one spoke in opposition to the amendment.) 113 Cong. Rec. 33196-7 (Nov. 20, 1967). Senator Allott was concerned that assistance be given to "a small, definable group of disabled individuals who need our help," for good faith adoptions by residents of the United States. 113 Cong. Rec. 33196.

Very little attention was given in the floor debate to the pros and cons of the particular mechanism suggested by Senator Allott's amendment, supervision by a child-placement agency. There was considerable expression of desire for a mechanism to separate the "worthy" or "good faith" cases from the cases of abuse, but little consideration of how and whether supervision by a child-placement agency would accomplish this end. Other than using the words "supervision of a public or private child placement agency," Senator Allott did not specify what agencies he did or did not have in mind.

The Hearing Officer took the position that the juvenile court could and should be considered a child-placement agency as used in Section 202(d)(8)(E). The primary function of the juvenile court, observed the hearing officer, was *placement*, "whether the subject be a juvenile delinquent, or a neglected or dependent child." (App. 38) In his earlier opinion, the hearing officer noted that

> one of the principal functions of [the juvenile court] is the "placement" of children in various appropriate environmental settings, including temporary and permanent custody, in foster homes, etc.
>
> In respect to the jurisdiction of juvenile courts in West Virginia—as is the case of most other states—such court takes full supervisory authority over the child, often placing him in a foster home (the adults therein sometimes being prospective adoptive parents); under the immediate supervision and/or custody of a suitable individual; or in some other environmental setting deemed to be in the best interests of the child. In a truly literal sense then, the court, a public entity, is extensively involved in *child placement*, proper environmental

placement being one of the prime functions of such a court in our modern society under the doctrine of *parens patriae* (i.e., the State acting in place of the parents). It is noteworthy that the *1966 Official Code of West Virginia,* Chapter 49, Article 5, Section 4, provides that "A person under the age of 18 years who appears before the juvenile court *in any capacity* shall be deemed to be a ward of the court and, protected accordingly * * *" (emphasis added). (App. 20-21)

It is a tenet of statutory construction that

> If upon examination the general meaning and object of the statute is inconsistent with the literal import of any clause or section, such clause or section must, if possible, be construed according to that purpose. 3 Sutherland, Statutory Construction (3rd ed.) §7210, p. 438.

"Child-placement agency" should be defined to include a juvenile court to avoid the constitutional issues cited earlier in this brief and to provide a fair and reasonable way for the original remedial purposes of the enactment of Section (d)(8)(E) to be realized.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be reversed and that Linda Gail Morris should be awarded child's insurance benefits, or, in the alternative, that she be awarded benefits provided that, at a fair and suitable hearing, petitioner demonstrates that she was not adopted for purposes of abuse.

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